IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 13-2410
Criminal

United States of America,

Appellee,

v.

Geshik-O-Binese Martin,

Appellant.

Appeal from the Judgment of the District Court
for the District of Minnesota, The Honorable
Donovan W. Frank, U. S. District Judge

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I

The stipulation that Geshik Martin is an Indian did not suffice to prove the element of Indian status, an element of all the charged offenses, because the stipulation did not address the criteria applicable to establishing that status.

At page 33 of its Brief, the Government cites an unpublished Ninth Circuit decision, *United States v. Red Star*, CR 10-60-GF-SEH, 2013 WL 458316,*1 (D. Mont. Feb. 6, 2013) to support its argument that the stipulation at issue in our case was sufficient to establish Indian status. *Red Star* ruled that defense counsel was not ineffective in failing to seek a judgment of acquittal based on the Government's alleged failure to prove Indian status. But in *Red Star* the stipulation said that because Red Star was an enrolled member of the Fort Peck Tribe, he is an Indian person. *Id*. (In the Eighth Circuit, tribal enrollment is dispositive of Indian status. *United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009), *cert. den.* 599 U.S. 1055, 130 S.Ct. 2364 (2010)). But the stipulation in our case says only that Geshik Martin is an Indian.

The Government at page 34 of its Brief says that "there is no reasonable possibility that the Government would not have been able to prove Geshik Martin's Indian status in the absence of the stipulation." The Court should reject

this statement because no record support exists for it. Nothing in the record on appeal shows that the Government would have been able to prove Indian status without the stipulation. And though the prosecutor described one way she would try to establish that *George Martin* had Indian status for purposes of 18 U.S.C. 1153 — by showing he has Indian-related tattoos (Feb. 20, 2013 pre-trial hrg., 80-81) — she never said what the Government would present as to Geshik Martin.

II

The District Court erred in admitting the stipulation to Indian status without ensuring that Geshik Martin knowingly and voluntarily agreed to its admission.

The Government argues at page 35 of its Brief that Geshik Martin does not claim that he signed the stipulation concerning his Indian status inadvertently or without sufficient knowledge. This is irrelevant. Martin's argument is that the District Court did not fulfill its responsibility to ensure that he knowingly and voluntarily had agreed to the stipulation.

Furthermore, making such an assertion, true or not, would be pointless. Obviously, Martin did not stand up and make any such claim at trial, let alone provide factual support for it, so even if he had asserted in his main brief that he signed the stipulation inadvertently or without sufficient knowledge, the Government would simply respond that the assertion was not made at trial, and no facts were presented then to support it. But the main reason case law says judges should inquire of defendants when they stipulate is to bring to light whether a defendant signed a stipulation with sufficient knowledge of what he or she was doing.

At page 39 of its Brief the Government says this Court's opinion in *United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977) does not address the level of inquiry

the judge had made into Lawriw's knowledge and voluntariness in stipulating to the facts alleged in the indictment, and that without this information Geshik Martin cannot ask this Court to assume that the judge in *Lawriw* inquired into to the stipulation's voluntariness to a greater extent than did the trial judge in our case.

But the Government's concern here has no basis. First, *Lawriw* makes it apparent that the court and the prosecutor "sufficiently addressed Lawriw . . . as to the rights that she surrendered as a result of signing the stipulation." 568 F.2d at 105 n.13. Second, the judge and prosecutor in *Lawriw* had to have inquired as to the stipulation's voluntariness to a greater extent than did the trial Judge in our case, since our Judge made no inquiry at all as to voluntariness, nor did the prosecutor.

III

The District Court denied Geshik Martin his Rule 43 and Constitutional rights to be present at his trial when its contact with the jurors went into areas it had not advised Martin of, resulting in presumptive prejudice, which the record shows was never dispelled.

Government's argument for plain-error review

The Government cites *United States v. Moe*, 536 F.3d 825, 829 (8th Cir. 2008) as authority for applying abuse-of-discretion review to defendants' arguments that the trial Judge's *ex parte* and unauthorized meeting with the jury violated the defendants' Fed. R. Cr. P. 43(a)(2) right to be present during the jury-impanelment process, and cites *United States v. Poitra*, 648 F.3d 884, 887 (8th Cir. 2011) as authority that this same standard applies to legal advice given the jury. Govt. Brief, p. 17.

The Government then claims that because the defendants did not object to the Judge's discussing matters with the prospective jurors that were outside the very limited scope of things that he had said he would discuss, plain error review applies, citing *United States v. Pirani*, 406 F.3d 543, 549-50 (8th Cir. 2005) and *United States v. Harris-Thompson*, 751 F.3d 590, 597-98 (8th Cir. 2014).

These standards and the cases cited do not apply. When a trial judge has

unauthorized, *ex parte* contact with jurors *United States v. Koskela*, 86 F.3d 122, 125 (8th Cir. 1996), and the other cases cited along with it at page 53 of our main Brief, govern review. The Government's claimed standard of review just seeks to escape the heavy burden *Koskela* and the cases it cites impose on the Government in these circumstances.

A look at the cases the Government cites confirms their inapplicability. *Moe* addressed not the situation of a judge's *ex parte* contact with jurors, but the quite different situation of a defendant not attending two conferences on matters of law that the judge had with the prosecutor and Moe's counsel, which Moe knew about but did not ask to attend, and which he in any event had no right under Rule 43(b)(3) (which codifies the Fifth Amendment right to be present) to attend. 86 F.3d at 830-31.

United States v. Poitra has nothing to do with a judge's *ex parte* unauthorized statements to jurors of the sort at issue in our case, because *Poitra* involved no *ex parte* contacts, just appellate review of final jury instructions given in the defendant's presence. 648 F.3d at 887. In that context, abuse of discretion review properly applied.

And the Government's citation to *United States v. Pirani* and *United States v. Harris-Thompson* as requiring plain-error review here has no support. *Pirani*

applied plain-error review because the defendant did not object at sentencing to a known *Booker* error that affected the sentence. 406 F.3d at 549-50 Again, the defendants in our case did not know of any error to which they could have objected, given the judge's assurances as to the limited scope of his meeting with the jurors.

Nor does *Harris-Thompson* provide any support for plain-error review. In that case the judge investigated contacts by the defendant's family with the jurors. 751 F.3d at 594. The defense on appeal challenged the judge's handling of this, which had included the judge interviewing the jurors outside the defendant's and counsel's presence, even though defense counsel, in Harris's presence, agreed to use that procedure. *Id*., at 597. In these circumstances plain-error review properly applied, because Harris knew what the court was going to do and did not object. And when he learned that the judge's discussion with the jury went beyond the jury's contact with the defendant's family members, he did not object or request an additional inquiry and to be present for that. *Id*., at 597-98. This is not the scenario in our case.

This Court must hold the Government to its burden to demonstrate beyond a reasonable doubt that the trial judge's presumptively prejudicial unauthorized contact with the jurors was harmless, as required by *Koskela*.

The Government's claim that the court's ex parte statements to the jury were not error.

The Government at pages 20-24 of its Brief cites several informational sources to which prospective jurors had access. Its argument seems to be that this apparently officially-approved information does not significantly differ from what the trial Judge in our case told the jurors in his unauthorized discussion with them. See Govt. Brief, p. 22.

But with one exception — discussed ahead — the Jury Handbook, the Frequently Asked Questions, and the Called to Serve video the Government cites are not at all like the improper and prejudicial statements and discussions the Judge had with the jurors outside Geshik Martin's presence, as the Government's own discussion of what these materials shows. Govt. Brief, pages 22-24. These informational materials for the most part contain the kind of information a court properly gives jurors in its preliminary and final instructions.

The Government says that these informational materials do not condone jury nullification. Govt. Brief, page 24. That doesn't matter, since neither did the trial Judge in his discussion with the jurors. The problem is that the Judge did just the opposite, as when he directly condemned the exercise of this power jurors

necessarily have, telling jurors they would be "taking the law into their own hands" if they exercised it (Vol. II, 301). Geshik Martin had no right to a nullification instruction, but he had an equal protection and due process right *not* to have the jury be told what no other juries are told in such an explicit way, that they cannot exercise this power.

The one exception to our point that the informational materials do not even come close in content to what our trial Judge told the jurors is the quotation at page 23 of the Government's Brief, from the Called to Serve video. That speaker says that jurors are asked to do things ". . . that they're really expert on . . . more expert than we judges are . . . about whether that witness is telling the truth or whether the witness really remembers."

The speaker was trying to make the legitimate point that persons selected for jury duty are capable of deciding the fact questions that will be presented to them because their everyday lives have provided them experience in doing that. But it overstated this capability to say that jurors are experts in making credibility determinations. No one is an expert at that. This remark is very close to being as improper as the trial Judge's repeated "jurors almost always get it right" statements because, like those statements, it gave the jurors an undeserved and irresponsible sense that whatever result they reached would be the correct one.

Hence, most of the jury-information materials did nothing to show that the trial Judge's unauthorized, *ex parte* discussion with the jurors did not prejudice Geshik Martin, and the quoted language from the video actually accentuated the presumptive prejudice that those discussions had on his right to due process and a fair trial.

CONCLUSION

For the reasons discussed in each of the preceding Reply Arguments and his main Brief, Geshik Martin requests that his conviction and sentence be set aside owing to insufficient evidence of Indian status, or because the court failed to determine if Martin knowingly and voluntarily entered into the stipulation to Indian status, an element of all the offenses. Alternatively, he must be retried, owing to the improper *ex parte* statements to the jury prejudicially affecting his rights under Rule 43 and the Constitutional to be present at all phases of his trial, and likewise affecting his rights to due process, equal protection and a fair trial.

Dated: August 29, 2014

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it has no more than 1,943 words, exclusive of this compliance statement, table of contents and table of citations, as determined by the word processing system used to prepare this brief (WordPerfect 10). The electronic version of this Brief has been scanned for viruses and has been found to be virus-free.

Dated: August 29, 2014

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